

“Lessons from the Mueller Report”

**Hearing Before the House Committee on the Judiciary
Monday, June 10, 2019**

**Statement for the Record of Barbara McQuade
Former United States Attorney, Eastern District of Michigan
Professor from Practice, University of Michigan Law School**

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Chairman Nadler, Ranking Member Collins, and distinguished members of the Committee: Thank you for inviting me to speak with you today about lessons from the Mueller Report regarding obstruction of justice.

I have served as a professor from practice at the University of Michigan Law School for the past two years, focusing on criminal and national security law. Before joining the law school, I had the privilege of serving the American people at the United States Attorney's Office for the Eastern District of Michigan for 19 years, first as a line assistant, then as Deputy Chief of the National Security Unit, and later as U.S. Attorney. I have handled and supervised cases involving national security and obstruction of justice, and I hope that my experience will be helpful to the committee.

I understand that we are bound by certain rules on decorum that prevent us from discussing allegations of misconduct against the president. While those rules may create challenges in providing complete responses to your questions, I will do my best to comply with those rules when answering.

Overview of Testimony

I have reviewed the Report on the Investigation into Russian Interference in the 2016 President Election ("Report"). The report's most important finding is that Russia interfered with our election in "sweeping and systematic fashion." Report, Vol. I, p. 1. It is important to view the president's conduct with that conclusion in mind.

Through that lens, I will share three observations about the report.

First, the conduct described in the report constitutes multiple crimes of obstruction of justice.

Second, the obstruction described in the report posed a risk to our national security because it was designed to prevent investigators from learning all of the facts about an attack on our country by a hostile foreign adversary.

Third, when a public official's misconduct is known to a foreign adversary, that knowledge leaves the official vulnerable to efforts to leverage his or her misconduct to its advantage, which compromises his or her ability to act in the best interests of the country.

Obstruction of Justice Occurred

First, I will explain my observations about obstruction of justice. As part of his mandate, Robert Mueller was asked to investigate obstruction of justice in connection with his investigation of Russian election interference. 28 C.F.R. § 600.4

Obstruction of Justice is a Serious Offense

Obstruction of justice cases are among the most serious matters that prosecutors investigate. As Mr. Mueller stated in his press briefing, “When a subject of an investigation obstructs that investigation or lies to investigators, it strikes at the core of the government’s effort to find the truth and hold wrongdoers accountable.” For this reason, obstruction of justice should not be dismissed as a mere “process” crime, with the suggestion that it is somehow less egregious than other offenses. In fact, it is more serious than many other crimes because it conceals the truth. For our system to bring offenders to justice, it is essential that witnesses are accessible to investigators, that they tell investigators the truth, and that they provide documents that are complete and accurate. Obstructive conduct is particularly harmful when the matter under investigation threatens our national security.

Obstructive Conduct in the Mueller Report

The crime of obstruction of justice includes *attempts* to obstruct, and does not require proof of an underlying crime. 18 U.S.C. § 1512(c)(2). In this case, of course, underlying charges were filed against 37 defendants, including Russian intelligence officials, and so efforts to obstruct Mr. Mueller’s investigation risked thwarting his ability to understand the full scope of the attack.

The special counsel’s report describes ten episodes of potential obstruction of justice. Proving obstruction of justice requires establishing three essential elements: an obstructive act, a connection to an official proceeding, and a corrupt intent. With regard to four of these episodes, the special counsel found “substantial evidence” for all three elements of obstruction of justice. Any one of these acts is enough to charge a crime of obstruction of justice against an ordinary person other than the president, but it is important to view the acts under the totality of the circumstances to provide appropriate context and to establish a corrupt intent.

First, the evidence shows a request to White House Counsel Don McGahn to remove Mr. Mueller as special counsel. Second, the evidence also shows a request to falsely deny public reports about that order and to create a false document to support the lie. Third, the evidence shows efforts to persuade Attorney General Jeff Sessions to reverse his recusal decision, and to publicly announce that the Russia investigation would focus on future elections only. Fourth, the evidence shows efforts to influence the testimony of Paul Manafort, another former campaign chairman.

The essential elements of the obstruction statute must be established in a criminal prosecution, which Mr. Mueller believed was not an option with regard to President Trump. Report, Vol. II, pp 1-2. Mr. Mueller wrote that Justice Department policy precluded him from charging a sitting president with a crime. *Id.* at 1. He further wrote that because he could not charge a sitting president, he believed that fairness precluded him from even accusing a sitting

president of a crime because he or she would lack the opportunity to clear his name in court. *Id.* at 2. Mr. Mueller further wrote that an accusation would “preempt constitutional processes for addressing presidential misconduct.” *Id.* at 1. (citing U.S. Const. Art., 1 § 2, cl. 5; § 3, cl. 6; cf. OLC Op. at 257-258 (discussing relationship between impeachment and criminal prosecution of a sitting president)). Mr. Mueller’s treatment of this issue is in contrast with his treatment of the conspiracy offense, for which he concluded that the investigation did not establish the crime of conspiracy. As Mr. Mueller wrote, “While this report does not conclude that the President omitted a crime it also does not exonerate him.” *Id.* at 2. Instead, Mr. Mueller sought “to preserve the evidence when memories were fresh and documentary materials were available” because other defendants could be charged, and a president may be charged after he leaves office.

Let me focus on one of those incidents. The report describes President Trump’s persistent efforts to curtail the special counsel’s investigation by directing Attorney General Sessions to reverse his recusal decision and to limit the investigation to future elections. Report, Vol. II, pp 90-98. According to the report, in the summer of 2017, President Trump went outside of official channels to his former campaign manager Corey Lewandowski, a private citizen, and asked him to convey his directive to Mr. Sessions to limit the investigation to future elections. After a failed attempt to meet with Mr. Sessions, Mr. Lewandowski asked another White House aide, Rick Dearborn, to pass along the message to Mr. Sessions. Mr. Dearborn did not convey the message. A month later, Mr. Trump asked Mr. Lewandowski whether he had delivered the message, and said that if Mr. Sessions would not meet, that Mr. Lewandowski should tell him he was fired. Mr. Trump publicly criticized Mr. Sessions for his recusal, and directed Chief of Staff Reince Priebus to force Mr. Sessions to resign, but Mr. Priebus did not comply.

But for the acts of his aides, Mr. Trump would have limited the investigation to future elections. Mr. Mueller identified “substantial evidence” that President Trump’s conduct would have the natural and probable effect of impeding the grand jury proceeding and was intended “to prevent further investigative scrutiny of the President’s and his campaign’s conduct.” *Id.*, at 97.

Although Mr. Mueller’s investigation did not establish the crime of conspiracy as a technical matter under federal statutes, the statute does not require proof of any underlying crime, which would have the unwanted result of permitting successful obstructors to avoid accountability. Moreover, Mr. Mueller wrote that “[a] statement that the investigation did not establish particular facts does not mean that there was no evidence of those facts.” In fact, Mr. Mueller found that “the Russian government perceived that it would benefit from a Trump presidency and worked to secure that outcome, and that the [Trump] Campaign expected that it would benefit electorally from information stolen and released through Russian efforts.” Mr. Mueller further wrote that “the investigation identified numerous links between individuals with ties to the Russian government and individuals associated with the Trump Campaign.” These links provided an incentive for Mr. Trump to thwart the investigation.

The report also describes evidence of another motive to conceal Russian involvement in the election as the perceived legitimacy of the outcome of the election. The report states: “Several advisors recalled that the President-Elect viewed stories about his Russian connections,

the Russia investigations, and the intelligence community assessment of Russian interference as a threat to the legitimacy of his electoral victory.”

Regardless of motive, the conduct described in the report was an attempt to interfere with Mr. Mueller’s investigation.

Hindering the Investigation of the Election Attack Harms National Security

Second, the obstructive conduct here is intertwined with Russia’s election interference, and threatens our national security. Mr. Trump’s attempt to limit the scope of the investigation to future elections, had it been successful, would have shielded Russia’s conduct in attacking the 2016 election from the investigation, a probe that yielded charges against more than two dozen Russian individuals and entities, and exposed what Mr. Mueller referred to as “sweeping and systematic” election interference. Report, Vol. 1, p. 1. Mr. Mueller’s work can be shared with the intelligence community to protect our country from future attacks. But for the intervention of other individuals, Mr. Trump would have thwarted Mr. Mueller’s efforts to gain valuable intelligence by limiting the investigation into Russian election interference.

While Mr. Mueller’s investigation did not establish the crime of conspiracy, he noted that his investigation was harmed by witnesses who lied, deleted communications, used encrypted message applications and invoked their Fifth Amendment privilege not to incriminate themselves. His inability to establish a case of conspiracy does not mean that the described conduct reflects the kind of loyalty to American interests we should expect.

By seeking to end or curtail the investigation, President Trump attempted to limit our country’s understanding of how Russia attacked our election, which would also diminish our ability to detect and defend against future threats.

Obstructive Conduct Itself Creates a National Security Risk

Third, in addition to diminishing Mr. Mueller’s ability to expose the truth about Russia’s attack on our election, a cover-up itself threatens national security because it compromises a President’s ability to act free from undue influence. Knowledge about unlawful or unflattering facts provides leverage that could allow a foreign adversary to pressure a government official to accede to its will, explicitly or implicitly.

For example, Mr. Mueller’s report refers to admitted lies to Congress by Michael Cohen, President Trump’s former attorney. Mr. Cohen admitted that he lied to Congress when he testified that negotiations to build a Trump Tower in Moscow ended in January 2016, when, in fact, they continued until June of 2016. Report, Vol. I, pp 74-75. That fact would have been known to Russians. The discrepancy between President Trump’s public statements and the truth could be used to compromise the President’s ability to act free from foreign influence to the detriment of our national security.

Mr. Mueller concluded his public remarks by “reiterating the central allegation of our indictments – that there were multiple, systematic efforts to interfere in our election. That allegation deserves the attention of every American.”

I hope to answer your questions to give that allegation the attention that it deserves.